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Case No. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF APPELLEE, STATE OF OHIO

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QUESTIONS PRESENTED

I. Does the First Amendment to the United States Constitution and *Stanley* v. *Georgia* 394 U.S. 557 (1969) guarantee to citizens the fundamental right and liberty to privately possess child pornography?

II. May a state prohibit private possession of child pornography consistent with the First Amendment where the material is a visual depiction of a nude minor child that involves a lewd exhibition or graphic focus on the genitals?

III. May a State Supreme Court consistent with due process authoritatively construe a statute prohibiting possession of child pornography and affirm a conviction under that construction where the legislative intent of the statutory scheme is clear and the narrowing construction foreseeable?

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STATEMENT OF THE CASE

In June, 1985, United States postal inspectors began an investigation of Century Twentieth Studios in Holiday, Florida, regarding the use of the United States mails to transmit child pornography. (Joint Appendix [hereinafter J.A.] 2-6, reflects the facts leading to Osborne's arrest.) The principals in Century Twentieth Studios were Jack S. Smith and Daniel S. Knous.

As a result of that investigation, postal inspectors had correspondence with Jack S. Smith. Smith and a postal inspector had correspondence through the mails and Smith offered the postal inspector various photographs depicting sexual activity between adults and minors. In one such item of correspondence Smith wrote to the postal inspector that he had an extensive collection of child pornography, including over 1,000 negatives, and that the negatives were in the possession of a friend of his in Ohio. Subsequently, a test letter was addressed and delivered to a post office box holder in Holiday, Florida, in which the postal inspectors ordered and paid for child pornography. Pursuant to that order Smith deposited in the United States mails an envelope that contained twenty color photographs of minors engaging in sexually explicit conduct. Some of those photographs depicted sexual conduct between Knous and minor females.

As a result of this investigation, on July 19, 1985 postal inspectors executed a federal search warrant on the premises of Jack S. Smith in the State of Florida, seized thousands of photographs which depicted minors engaging in sexual conduct, as well as other books and records. Smith and Knous were arrested and subsequently convicted on federal charges arising from the use of the United States mail to distribute child pornography.

After his arrest, Smith advised Postal Inspector Witouski that photographic negatives of child pornogra-

phy were in the possession of a friend of his in Ohio named Clyde.

Knous, after his arrest, advised Postal Inspector Witouski that the child pornography negatives were in the possession of an associate of Smith's named Clyde Osborne, who resided in Columbus, Ohio.

During the execution of the federal search warrant in Florida, mailing lists were seized. Included on one such list that was seized by the postal inspectors was the name of Clyde Osborne, 793 North Park Street, No. 3, Columbus, Ohio, 43215. When Postal Inspector Witouski reviewed the evidence seized from the federal search warrant on July 22, 1985 he located among that evidence a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.50 (Three dollars and 50/100), dated June 3, 1985. The reverse side of the cancelled check disclosed that the address of 793 North Park Street, No. 3, Columbus, Ohio, 43215 was inscribed thereon, and that the check had been cashed at Christie's Market, 680 North High Street, Columbus, Ohio, which is within several blocks of Osborne's address on Park Street.

Postal Inspector Witouski notified United States Postal Inspector Paul Hartman, Cleveland, Ohio, who related all of the above information to Detective James A. Phillips, Columbus Police Department, Child Pornography Task Force.

Based on the above information, Detective Phillips applied for and obtained a search warrant to search the premises of Clyde Osborne at 793 North Park Street, No. 3, Columbus, Ohio, 43215 for child pornography. A copy of the search warrant is contained in the Joint Appendix. (J.A. 2-6)

The items seized from Osborne's premises pursuant to the search warrant were a letter to Jack Smith, a brown envelope containing negatives, a brown photo album, miscellaneous photos, film and camera equipment, and a magazine entitled Ohio Gay Guide. (State's Exhibit No. 3, Search Warrant; R.3, R.36)

Thereafter, Osborne was charged by criminal complaint in the Franklin County, Ohio Municipal Court with a violation of Section 2907.323(A)(3), Ohio Revised Code, (J.A. 7), and the matter was scheduled for a jury trial.

Prior to trial, Osborne's counsel moved to dismiss the charges on the grounds that the Ohio statute was vague, overbroad, and violated a right to privacy. (R.3). The trial court overruled this motion. (R.7) At the trial the brown photo album was marked as evidence and identified by the investigating detectives. (J.A. 8, 15).

The brown photo album contained numerous photographs of nude males of various ages and Osborne admitted that he had taken some of those photographs. (J.A. 12).

Osborne had mounted the four photographs that are the subject of this prosecution in that brown photo album.(J.A. 18).

Those photographs were State's Exhibits 1A, 1B, 1C, and 1D in the trial court, were marked, identified, and admitted into evidence over Osborne's objection in the State's case in chief. (J.A. 9-11; R.52, 69, 73).

State's Exhibits 1A through 1C were Polaroid photographs, and State's Exhibit 1D had the notation on the back of the photograph of "Tommy - 13". (J.A. 9, 11).

State's Exhibits 1A through 1C depict the same young male child on a bed in various poses, which child Osborne stated was 14 years of age when the photographs were taken. (J.A. 13, 14,16).

In State's Exhibit 1A the 14 year old boy is depicted laying on his back in a provocative pose in a bed with his legs spread apart, and with an erect penis that Osborne described as a "hard on" (J.A. 20). The boy is holding something in his hand that Osborne described as electri-

cal, with a cord attached to it. (J.A. 20).

State's Exhibit 1B depicts the same 14 year old boy in an almost gymnastic pose on the bed with his hands behind his head and his arms looped between the inner part of the knee with his stretched and exposed anus in graphic focus.

In State's Exhibit 1C this 14 year old boy is depicted on the bed with his legs spread-eagled and in one of his hands placed into his anus is an item Osborne identified as a "dildo", but noted that "you can't tell from the picture whether there's any penetration." (J.A. 21). On the bed in this shot is the same electrical device shown in State's Exhibit 1A that Osborne said looks like a sander. (J.A. 21).

State's Exhibit 1D is a photograph of a different boy who is standing with his hands placed on his hips and a graphic focus on the male genitals. This photograph depicts the boy only between the shoulders and the knees. (J.A. 9). On the back of this Exhibit is the notation "Tommy - 13". (J.A. 9, 19). The background in this photo matches the background in the three Polaroid photos of the 14 year old boy.

Osborne obtained these four photographs from Jack Smith, the principal in Century Twentieth Studios, who had taken the photos and personally delivered them to Osborne in Columbus. (J.A. 17). Osborne did not know if the photos were taken in Florida or Ohio, "They could have been taken anyplace" because Smith used to travel around the country with a circus. (J.A. 18).

Osborne did not know the young boys in these photographs, and he was not their parent or ward. (J.A. 22).

Osborne mounted these four photos in his brown photo album, kept these photographs for at least three years, and periodically looked at them. (J.A. 15-16).

Neither at the time of his arrest nor during his testimony at trial, and in this court, did Osborne or his counsel claim that these four photographs contained serious literary, scientific, artistic or social value, or that they were possessed for a bona fide statutory purpose. Osborne and his counsel did not claim that the photographs communicated "information and ideas" or were possessed to "satisfy his intellectual and emotional needs".

The Jury in this case did not take long to find Osborne guilty of violating Section 2907.323(A)(3), Ohio Revised Code.

The trial judge imposed a sentence of six months, (J.A. 23), and the intermediate Ohio Court of Appeals, Tenth District, affirmed Osborne's conviction and sentence. (J.A. 25-34).

The Tenth District Ohio Court of Appeals certified their judgment to the Ohio Supreme Court as in conflict with a judgment of the First District Ohio Court of Appeals. The case was certified by the Ohio Court of Appeals on the *Stanley* v. *Georgia* 394 U.S. 557 (1969) issue regarding prohibiting private possession of child pornography.

In the interim, while Osborne's case was pending, the Ohio Supreme Court heard and decided *Ohio* v. *Meadows* 28 Ohio St. 3d 43, 503 N.E. 2d 697 (1986), the First District Court of Appeals case, and held that the child pornography possession statute did not violate the First Amendment.

Two other child pornography possession convictions were summarily affirmed on the same day as the *Meadows* decision. See *Ohio* v. *Modeen* 28 Ohio St. 3d 64, 502 N.E. 2d 634 (1986), and *Ohio* v. *Robinson* 28 Ohio St. 3d 65, 502 N.E. 2d 634 (1986).

Although the *Stanley* issue which had been certified had already been decided in favor of the State in the above cited cases, the Ohio Supreme Court considered that and the remaining issues presented by Osborne and affirmed his conviction *sub nom Ohio* v. *Young* 37 Ohio

St. 3d 249, 525 N.E. 2d 1363 (1988). (J.A. 37-54).

The Ohio Supreme Court re-affirmed its holding in *Meadows*, which involved possession of child pornography under another statute, Section 2907.322(A)(5), Ohio Revised Code, and applied the same reasoning to Section 2907.323(A)(3), Ohio Revised Code, the statute under which Osborne was convicted. (J.A. 39- 40).

Regarding Osborne's claim that the statute was vague and overbroad, the Ohio Supreme Court applied the "substantial overbreadth" doctrine from *Broadrick* v. *Oklahoma* 413 U.S. 601(1973), and found that the statute was "not constitutionally infirm on the basis of overbreadth". (J.A. 42).

In considering Osborne's claim that the term "nudity" was overbroad, consistent with *Ferber* and the Ohio statutory scheme that regulates the production, distribution, and possession of child pornography, the Ohio Supreme Court construed Section 2907.323(A)(3), Ohio Revised Code, to apply "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals". (J.A. 37).

Not surprisingly, the Ohio Supreme Court accorded the term "minor" its ordinary, common, and everyday meaning of a person under the age of eighteen. (J.A. 37).

Against Osborne's claim that the statute does not provide for scienter, the Ohio Supreme Court followed an Ohio statute and a long series of Ohio cases in holding that the relevant culpable mental state was "recklessness". (J.A. 37, 44).

Although a jury charge on recklessness was neither requested by Osborne, nor the charge objected to in this regard, the Ohio Supreme Court applied the "plain error" doctrine and found that Osborne "would still have been convicted if a proper instruction on recklessness had been given, and his conviction must stand" (J.A. 46- 47).

The Ohio Supreme Court affirmed Osborne's conviction, denied a motion for rehearing, and granted a stay pending appeal to this court. (J.A. 35, 55, 56).

This Court noted probable jurisdiction on June 26, 1989, 492 U.S. ____ , 106 L.Ed. 563, and the matter is before the Court on the merits.

SUMMARY OF ARGUMENT

The State of Ohio has a comprehensive statutory scheme that regulates the production, distribution, and possession of child pornography. (See Section 2907.321, *et seq.*, Ohio Revised Code.)

Ohio has a compelling interest in protecting children from sexual abuse and exploitation, including the circulation and possession of the "permanent record" of the sexual exploitation in the underground pedophile market that has developed since this Court's decision in *Ferber*.

The legislators in Ohio, and eighteen other states, have reasonably concluded that a possession statute is necessary to avoid that harm and to "dry up" the last and most important link in the underground chain of distribution of child pornography and to serve the compelling interest of protecting children from further harm.

Stanley v. *Georgia* 394 U.S. 557 (1969) held that there is a First Amendment fundamental right and liberty to privately possess obscene material.[1] Stanley was based on the principle that the First Amendment protects the right to "receive information and ideas, regardless of their social worth, which is *fundamental* to our free society." *Id.* at 564. (Emphasis added)

Ohio submits that *Stanley* is not applicable in this case because Osborne does not have a fundamental right or liberty to possess child pornography that is "deeply rooted in this nation's history and tradition", *Moore* v.

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[1]Osborne has not premised his privacy claims upon either the Fourth or Ninth Amendments, but solely upon the First Amendment, both in the Ohio courts and the jurisdictional statement in this court. Ohio will only address this issue in the First Amendment context because the *Stanley* "decision was firmly grounded in the First Amendment", *Bowers* v. *Hardwick* 478 U.S. 186, 195 (1986), and not the Fourth, Ninth, or Fourteenth Amendments.

East Cleveland 431 U.S. 494, 503 (1977) or is such a fundamental right "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed". *Palko* v. *Connecticut* 302 U.S. 319, 325 (1937).

Stanley, itself, and this Court more recently in *Bowers* v. *Hardwick* 478 U.S. 186, 195 (1986), recognized that otherwise illegal conduct is not immunized or beyond the pale of state regulation merely because the conduct occurred within the confines of the offenders home.

In *Stanley*, *supra* at 568 n.11 the Court said that its decision did not infringe on the states power to criminalize private possession of narcotics, firearms, or stolen goods, "nor do we mean to express any opinion on the statutes making criminal possession of other types of printed, filmed, or recorded materials." The court went on to say, "In such cases *compelling reasons* may exist for overriding the right of the individual to possess those materials". Id. 568 n. 11. (Emphasis added) Such compelling reasons exist regarding private possession of child pornography.

The fundamental right to "read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home", *Stanley*, supra at 565, does not extend an unrestricted right to privately possess child pornography.

Given that Osborne does not have a fundamental right or liberty to privately possess child pornography, Ohio's compelling interest in protecting its children from the scars of past sexual abuse, and preventing future sexual abuse, far outweigh whatever rights of Osborne that are presumptively implicated in this First Amendment equation.

In *New York* v. *Ferber* 458 U.S. 747 (1982) this Court held that child pornography was not protected speech under the First Amendment. However, the fact that child

pornography is not protected speech under the First Amendment is not enough to support the State's possessory offense, because obscene material also is not protected speech and *Stanley* precluded criminalizing private possession of obscene material.

What distinguishes Osborne from *Stanley* is the compelling State interest "of surpassing importance", *Ferber*, *supra* at 757, to protect and prevent harm to children from sexual abuse and exploitation which are inherent in the production, distribution, possession, and use of child pornography.

The asserted interest of Georgia in *Stanley* "to protect the individuals mind from the effects of obscenity", Id. at 565, pales by comparison with Ohio's interest in protecting children from sexual exploitation, which interest is "evident beyond the need for elaboration". *Ferber*, *supra* at 756.

Production and distribution statutes do not attack the last link in the chain of the child pornography market-at home possession and use of child pornography. Possession statutes are narrowly tailored to serve the State's interest of protecting children by breaking that last link in that chain and "drying up" the child pornography market, which has been driven underground since *Ferber*. In addition, besides the harm to children by continued possession of the permanent record of child sexual abuse, those who possess child pornography use that material to facilitate the seduction of other children to engage in sexual activity. *Attorney General's Commission on Pornography*, Final Report (July, 1988).

Ohio asserts that the State interests served by a possession statute far outweigh whatever First Amendment right Osborne has to private possession of unprotected material under *Stanley*.

In addition to *Stanley*, Osborne claims a First Amendment violation because the Ohio statute regulates nude

minors involved in lewd exhibitions or graphic focus on the genitals.

The New York statute upheld in *Ferber* defined sexual conduct to include a "lewd exhibition of the genitals". As stated in *Ferber* itself, "the term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation" Id. at 765. Child pornography which involves a "lewd exhibition or graphic focus on the genitals" is not substantially overbroad, has not been given an expansive construction by Ohio, and "whatever overbreadth may exist should be cured through case-by-case analysis". *Broadrick* v. *Oklahoma* 413 U.S. 601, 615 (1973).

Finally, Osborne contends that applying the Ohio statute to him as authoritatively construed by the Ohio Supreme Court violates the due process clause of the Fourteenth Amendment due to its pre-construction vagueness and overbreadth.

The legislative intent of the Ohio statutory scheme regulating child pornography is clear and the authoritative construction of nudity to a lewd exhibition or graphic focus on the genitals was foreseeable. This Court has long held in such situations that the statute, as construed, "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants." *Massachusetts* v. *Oakes* 491 U.S. ___, 105 L.Ed. 493, 502 (1989), citing *Dombrowski* v. *Pfister* 380 U.S. 479 491 n. 7 (1965).

Because the statutory scheme is not void for vagueness, and the construction was foreseeable with fair warning, its application to Osborne does not offend due process.

I. *Stanley*

A. Introduction

When *Stanley* v. *Georgia* 394 U.S. 557 (1969) was decided by this Court the problem of child pornography had not yet become the scourge upon this nation that it is today.[2]

It is only "In recent years, [that] the exploitive use of children in the production of pornography has become a serious national problem." *New York* v. *Ferber* 458 U.S. 747, 749 (1982).

The United States Congress found that "[c]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale"[3], and reacted by adopting The Protection of Children From Sexual Exploitation Act of 1977.[4] As noted in *Ferber*, most states also enacted statutes prohibiting production and distribution of child pornography. Id. 749.

In these early stages of combatting the problem, most statutes required that children not only be involved, but that the material itself fit the legal definition of obscenity under *Miller* v. *California* 413 U.S. 15 (1973). It was at that time that Ohio enacted Section 2907.321, Ohio Revised Code, that prohibits the production, advertisement, or distribution of obscene material that has a minor as

[2]The 1970 Report of the Commission on Obscenity and Pornography did not document a child pornography problem, and noted that "the taboo against pedophilia... has remained almost inviolate". Id. at 139.

[3]S. Rep. No. 95-438 p. 5 (1977); *New York* v. *Ferber* 458 U.S. 747, n.1 (1982).

[4]P.L. 95-225, 92 Stat. 7 (1978), 18 U.S.C.S. §§2251 et seq. (1979). Both the New York Statute at issue in *Ferber* and the Child Protection Act included "lewd exhibition of the genitals" by minors within the definition of child pornography.

one of its participants.[5]

Thereafter, exercising "greater leeway in the regulation of pornographic depictions of children", *Ferber*, *supra* at 756, twenty states prohibited the distribution of child pornography without the requirement that the material be obscene. Id. 749.

In *Ferber*, this court recognized and classified child pornography as a category of material without First Amendment protection. As a result of *Ferber*, Congress and the states either removed the obscenity requirement from existing statutes or enacted additional statutes involving child pornography that did not require that the material be obscene. Congress enacted The Child Protection Act of 1984, both removing the obscenity requirement and that the trafficking be for commercial purposes.[6]

The legislative response to the child pornography problem, and the *Ferber* decision, had driven the child pornography market underground and into a non- commercial market of pedophiles who bartered, traded, exchanged and sold the material among themselves.[7]

As a final response to this problem, with increasing information available that child pornography is used by pedophiles to seduce other children into sexual activity,[8]

[5]Section 2907.321, Ohio Revised Code, is set forth in its entirety in the Appendix.

[6]P.L. 98-299, 98 Stat. 204 (1984), still codified at 18 U.S.C.S. §§2251 *et seq*. In addition, the word "lascivious" was substituted for the word "lewd" regarding exhibition of the genitals or pubic area.

[7]Attorney General's Commission on Pornography, Final Report (1986), Chapter 11 entitled "Child Pornography", p. 133,150.

[8]K. Lanning, Collectors, in Child Pornography and Sex Rings (A. Wolbert Burgess Ed. 1984) p. 86; U.S. Dept. of Justice, Federal Bureau of Investigation, Child Molesting: A Behavioral Analysis for Law Enforcement, (1986), p.61; Attorney General's Commission on Pornography, Final Report (1986), Chapter 11 Entitled "Child Pornography" p. 138, 150; K. Lanning, Child Molesters: A Behavioral Analysis (2nd Ed. 1987).

and to "dry up" the last link in the underground chain of distribution for child pornography, Ohio and eighteen other states across the nation have criminalized the possession of child pornography.[9] Ohio's child pornography possession statutes are codified in Sections 2907.322 and 2907.323, Ohio Revised Code.[10]

When Osborne and others have been charged under those possessory statutes they have claimed that the First Amendment to the United States Constitution and *Stanley* v. *Georgia* 394 U.S. 557 (1969) protect the fundamental right and liberty to privately possess child pornography.

State Court decisions, federal court opinions, and legal commentators on this issue have all unanimously concluded that the State's compelling interest in protecting it's children from sexual abuse and exploitation far outweigh whatever rights are presumptively implicated

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[9]Alabama - §13A-12-192 (1984), Code of Alabama; Arizona - §13-3553 (1983), Arizona Revised Statutes; Colorado - §18-6-403 (1988), Colorado Revised Statutes; Florida - §827.071 (1985), Florida Statutes; Georgia - §16-12-100 (1987), Code of Georgia Annotated; Idaho - §18-1507 (1987), Idaho Code; Illinois - §11-20.1 (1985), Illinois Revised Statutes; Kansas - §21-3516 (1986), Kansas Statutes Annotated; Minnesota - §617.247 (1983), Minnesota Statutes; Missouri - §573.037 (1987), Missouri Revised Statutes; Nebraska- §28-809 (1988), Revised Statutes of Nebraska; Nevada - §200.730 (1983), Nevada Revised Statutes; Ohio - §2907.322 and §2907.323 (1984), Ohio Revised Code; Oklahoma - §1021.2 (1984), Oklahoma Statutes; South Dakota - §22-22-23-1, 22-22-23.1 (1988), South Dakota Codified Laws Annotated; Texas - §43.26 (1985), Texas Penal Code Annotated; Utah - §76-5a-3(1)(a) (1988), Utah Code Annotated; Washington - §9.68A.070 (1984), Revised Code of Washington; West Virginia - §61-8C-3 (1988), West Virginia Code.

[10]Sections 2907.322 and 2907.323, Ohio Revised Code, are set forth in their entirety in the Appendix.

under the First Amendment and *Stanley*.[11]

B. The First Amendment and *Stanley* v. *Georgia* 394 U.S. 557 (1969) do not confer a fundamental right to private possession of child pornography.

This Court stated in Stanley:

> Our holding in the present case turns upon the Georgia statute's infringement of *fundamental liberties* protected by the First and Fourteenth Amendments. *Stanley*, *supra* at 568 n.11.

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[11]*Ohio* v. *Young* and *Osborne* 37 Ohio St. 3d 249, 525 N.E. 2d 1363 (1988), *Ohio* v. *Meadows* 28 Ohio St. 3d 43, 503 N.E. 2d 697 (1986) cert. den. 480 U.S. 936, *Ohio* v. *Modeen* 28 Ohio St. 3d 64, 502 N.E. 2d 634 (1986); *Ohio* v. *Robinson* 28 Ohio St. 3d 65, 502 N.E. 2d 634 (1986); *Ohio* v. *Stover* 25 Ohio Bar Reports 349 (1985); *Illinois* v. *Geever* 122 Ill. 2d 313, 522 N.E. 2d 1200 (1988), dismissed for want of jurisdiction 102 L.Ed 2d 319 (1988); *Felton* v. *Alabama* 526 So.2d 635, aff'd 526 So.2d 638 (1988); *Washington* v. *Davis* 53 Wash. App. 502, 768 P.2d 499 (1989); *Savery* v. *Texas* 767 S.W.2d 242 (1989); *Illinois* v. *Johnson* Case No. 1-88-0867 (Appellate Court of Illinois, First District, 2nd Div.) 1989 Westlaw 76285 (1989); *Florida* v. *Beckman* (District Court of Appeal, 5th District) 14 Fla.L.Week 1621,1989 Westlaw 72746 (1989); *United States* v. *Andersson* 803 F.2d 903 fn. 3 (7th Cir. 1986), cert den. 479 U.S. 1069; *United States* v. *Boffardi* 684 F.Supp. 1263, 1267 (S.D.N.Y. 1988); *United States* v. *Mercado* Case No. 86-1872 (6th Circuit 1987), Unpublished decision 828 F.2d 20, text in Westlaw; "Validity and Construction of 18 U.S.C.S. §§371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography" 86 A.L.R. Fed. 359, 368 (Lawyers Co-operative Publishing Co. 1988); Stanley + Ferber = the constitutional crime of at-home child pornography possession, Josephine R. Potuto, 76-Ky. L.J. 15 (1987-1988). Cf. *Illinois* v. *Spargo* 431 N.E.2d 27 (1982); *New York* v. *Godek* 449 N.Y. Supp. 2d 428 (1982); *United States* v. *Miller* 776 F.2d 978 (11th cir. 1985), cert den. 475 U.S. 1129.

For the appellant to prevail herein, this court must conclude that there is a "*fundamental right*" to possess child pornography in the privacy of the home, which right is secured by the First and Fourteenth Amendments to the United States Constitution. Suffice it to say that such a right is not explicitly secured by the above amendments. However, in a series of cases the court has held that certain rights are so fundamental to freedom and liberty that they are beyond the pale of state regulation. *Pierce* v. *Society of Sisters* 268 U.S. 510 (1925), and *Meyer* v. *Nebraska* 262 U.S. 390 (1923) were described as dealing with child rearing and education; *Prince* v. *Massachusetts* 321 U.S. 158 (1944), with family relationships; *Skinner* v. *Oklahoma* 316 U.S. 535 (1942) with procreation; *Loving* v. *Virginia* 388 U.S. 1 (1967) with marriage; *Griswold* v. *Connecticut* 381 U.S. 479 (1965) and *Eisenstadt* v. *Baird* 405 U.S. 438 (1972) with contraception; and *Roe* v. *Wade* 410 U.S. 113 (1973) with abortion. A more recent case decided by the court is *Bowers* v. *Hardwick* 478 U.S. 186 (1986), which held that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy in the privacy of their home.

Accepting these cases at face value, it is clear that none of the fundamental rights announced therein bears any resemblance, or supports, a claim to a fundamental right to possess child pornography in the privacy of the home. Indeed, if anything, *Bowers* v. *Hardwick*, *supra* supports the position of the State on that issue.

The fundamental rights from the Constitution that are not explicit therein have been characterized as those liberties that are "deeply rooted in the nation's history and tradition", *Moore* v. *East Cleveland* 431 U.S. 494, 503 (1977), or those fundamental liberties that are "implicit in the concept of ordered liberty", such that "neither

liberty nor justice would exist if [they] were sacrificed." *Palko* v. *Connecticut* 302 U.S 319, 325, 326 (1937).

Quoting from *Bowers* v. *Hardwick*, *supra*, the court's observations with respect to *Stanley* are equally applicable herein:

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.* at 568, n 11. And if respondents submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. *We are unwilling to start down that road.* (Emphasis added.) *Bowers* v. *Hardwick*, *supra* at 195-196.

Thus, the State of Ohio contends that because a "fundamental right" is not involved, that *Stanley* v. *Georgia*, *supra* does not confer a right secured by the First Amendment to privately possess child pornography in the home.

C. The State has a compelling interest of surpassing importance in prohibiting private possession of child pornography.

Should the court find that Osborne has a fundamental right under the First Amendment "to be free from state inquiry into the contents of his library", *Stanley*, *supra* at 565, of child pornography in the privacy of his home, that does not end the inquiry.

Stanley itself said:

> Nor do we mean to express any opinion on statutes making criminal possession of *other types of printed, filmed or recorded materials*. See eg., 18 U.S.C. §793(d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation..." *In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials*.

Stanley, supra at 568 n.11. (Emphasis added).

Osborne claims that the State interest in prohibiting private possession of child pornography is no greater than the interest in prohibiting private possession of obscene material.

Ohio disagrees, and submits that compelling reasons exist to override whatever First Amendment right may exist for Osborne to privately possess child pornography.

1. Prohibiting private possession of child pornography protects children and prevents further underground circulation and distribution of the permanent record of child sexual abuse.

The same compelling interests identified by the Court in *Ferber* to justify a child pornography distribution statute are supported and served by Ohio's possession statute.

As stated by the Court, "[t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child". *Ferber, supra* at 758.

When such performances are recorded, distributed and *possessed* the child's privacy interests are invaded. While "[t]he materials produced are a permanent record of the

children's participation and the harm to the child is exacerbated by their circulation", Id. 759, this harm does not end with the sale or distribution of the material but continues while that permanent record is possessed by the pedophile, even if the possession is in the privacy of the home.

The photographs possessed by Osborne of that 14 year old boy depicted in State's Exhibits lA, lB, and lC continue to exploit and victimize him "because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place." *Ferber*, supra at 759 n.10. Possession of those photographs by Osborne violates that child's "individual interest in avoiding disclosure of personal matters." Id., citing *Whalen* v. *Roe* 429 U.S. 589, 599 (1977).

Both intuitively, and based on work with child pornography and sex abuse victims "experts seem to agree that a child depicted in pornography suffers injury not only from participation in the sexual activity *but also by having to deal with the existence of an always available permanent record*". (Emphasis added) *Stanley + Ferber = The constitutional crime of at-home child pornography possession*, Josephine Potuto, 76 Ky. L.J. 15 (1987- 88) (hereinafter *Potuto*).

The state interest and the authorities relied upon by the *Ferber* court are equally applicable and compelling reasons to justify a possession statute in terms of the harm caused to children by possession of the permanent record of sexual abuse by those in the underground child pornography market.

2. Prohibiting private possession is necessary to dry up the last and most important link in the child pornography market.

Consistent with this court's direction that "States are

entitled to greater leeway in the regulation of pornographic depictions of children", *Ferber*, *supra* 756, the Ohio General Assembly concluded that the adoption of a child pornography possession statute was necessary to "dry up" the last and most important link in the chain of the child pornography market.

Not only Ohio, but eighteen other states, have "determined that it is necessary to prohibit possession of such materials in order to halt sexual exploitation and abuse of children". *Ohio* v. *Meadows* 28 Ohio St. 3d 43, 51; 503 N.E.2d 697, 704 (1986). See also *Illinois* v. *Geever* 122 Ill. 2d 313, 522 N.E. 2d 1200, 1206 (1988), app. dism. 102 L.Ed. 319. ("The legislature has sought to "dry up" the final and most important link in the chain of distribution of child pornography.")

As this court noted in *Ferber*, *supra* at 759 "[t]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."

With the enactment of production and distribution statutes and the *Ferber* decision, much of the child pornography market has been driven underground, and contrary to Osborne's assertion, is non-commercial.[12]

While it was "difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce" child pornography at the time *Ferber* was decided, Id. 759- 760, the stark reality is that it is now equally difficult, if not impossible, to address and solve this problem that has gone underground by only attacking production and distribution.

Child pornography is produced and distributed, and

[12]Attorney General's Commission on Pornography, Final Report, Chapter 11, entitled "Child Pornography", p. 133; Potuto, *supra* at 44, n.124.

more often homemade as in Osborne's case, because pedophiles desire to possess and use the material. Production of child pornography will continue, with the attendant grave harm caused to children through its production, as long as there is a pedophile market for such material. *Illinois* v. *Geever*, supra at 1206.

No one, including both New York police detectives and Osborne, can any longer walk into Paul Ferbers Adult bookstore in Manhattan and purchase child pornography. For that reason, the focus of law enforcement must include possession of the material, as well as distribution, if the child pornography market is to be dried up.

In *Ferber*, this court found that "the only practical method of law enforcement may be to dry up the market for this material", Id. 760, and with the clandestine underground child pornography market, this can only be accomplished with the additional tool of a possession statute.

If the market can be dried up, further sexual exploitation of children through production will be prevented.

3. Child pornography possession statutes serve the compelling state interest of preventing further exploitation of children by use of the material to seduce other children into sexual activity.

In *Stanley*, Georgia was concerned with protecting "the individuals mind from the effects of obscenity." Id. 565.

Ohio seeks not to protect the possessor, but victims of the possessor.

One purpose of child pornography possession statutes, and a compelling interest of surpassing importance, is to protect other children from the pedophile who uses child pornography to seduce minors into engaging in sexual activity. That seduction process and sexual activity results in the production of further child pornography as a memorialization of the child sexual abuse.

This cycle of child sexual abuse, which includes the production and use of child pornography, is described as follows:

> While some pedophiles only collect child pornography and fantasize through it, many have used it as a device to aid in the production of their own child pornography.
>
> Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity. From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography.
>
> A pedophile offender will use child pornography in which the children appear to be having a good time. The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.
>
> Child pornography is also used to illustrate the activities in which the pedophile wishes a child to engage. In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.
>
> Pornographic depictions of a child may be used to blackmail the child. The pedophile offender will use the pictures to intimidate the child. The pedophile offender will threaten the child with showing the pictures to others if the child does not cooperate.
>
> Child pornography is also seen as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors. This subjects a child to repeated victimization of countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies. Child pornography which may have originated as a homemade item may eventually be sold to a commercial child pornography publication.[13]

The possession and use of child pornography in the manner outlined above provides a critical difference from the obscene material possessed by *Stanley*, which Georgia sought to protect him from, and the state's interest in this case.

By prohibiting private possession of child pornography, the State is depriving the pedophile of the "criminal tool", *Potuto*, 44-45, necessary to commit further child sexual abuse and produce additional child pornography. That "criminal tool" is subject to regulation under *Stanley*. Id. 568 n. 11.

The interests of the State in protecting its children who

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[13]Final Report of the Attorney General's Commission on Pornography, Chapter 11, Entitled "Child Pornography", P. 138, 150, footnotes omitted. See also K. Lanning, Collectors, in Child Pornography and Sex Rings (A. Wolbert Burgess Ed. 1984) p.86; U.S. Dept. of Justice, Federal Bureau of Investigation, Child Molesting: A Behavioral Analysis for Law Enforcement (1986) p.61; S. O'Brien, Child Pornography, 89, (1983); P. Campagna and D. Poffenberger, The Sexual Trafficking in Children, 118 (1988); Report of the Surgeon Generals Workshop on Pornography and Public Health, Office of Surgeon General, U.S. Dept. of Health and Human Services (Aug. 1986) p. 14; See *Amicus* Brief of Concerned Women for America, p. 12-17; Potuto, p. 44-45.

are potential child sexual abuse victims in this vicious cycle is different than the "antisocial conduct" that the *Stanley* court felt insufficient to support Georgia's statute.

First, unlike *Stanley*, as noted above, there is an empirical basis to support the State's claimed interest. Second, the suggested solution to this problem in *Stanley* was "education and punishment", Id. 567, citing *Whitney* v. *California* 274 U.S. 378 (1927). The child victim is not a likely candidate for education because "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Belloti* v. *Baird* 443 U.S. 622, 635 (1979). Thus, educating our children will not adequately address the prevention of further sexual exploitation through the use of child pornography. Education of the pedophile can only occur after identification and prosecution, through a treatment and rehabilitation process, yet at that time the harm is done to the child. In the alternative of seeking to punish the subsequent sexual exploitation, the State faces the same problems identified by the court in *Ferber*, supra at 760 n.11, as well as problems with child witnesses, competency to testify, parental resistance to prosecution due to a fear of further harm to the child by reliving the abuse, and lack of corroboration, which is essential in those type of cases. While "the need to ease the administration of otherwise valid criminal laws" did not override *Stanley's* fundamental rights, Id. 568, both the harm caused to past and potential child sex abuse victims, and Osborne's lack of a fundamental right to possess child pornography, serve to distinguish *Stanley* in this regard.

Ohio submits that the prevention of further use of child pornography to victimize other children, a "secondary effect" of child pornography, is a compelling interest that

outweighs the value of permitting private possession.

D. The State's compelling interests outweigh any right to privately possess child pornography.

This court has repeatedly refused to extend *Stanley* beyond the narrow and specific facts of that case, with *Stanley* itself suggesting an exception where compelling reasons exist. See *United States* v. *12 200-ft. Reels* 413 U.S. 123, 127-128 (1973) (Stanley is to be viewed as "explicitly narrow and precisely delineated" and the Court was "not disposed to extend the precise, carefully limited holding of Stanley to importation of obscenity for private use); *United States* v. *Orito* 413 U.S. 139, 142 (1973) (Stanley not extended to use of mails to transport obscenity, even for private use); *United States* v. *Thirty-Seven Photographs* 402 U.S. 363 (1971) (Stanley not applicable to private transportation of obscene materials for commercial use); *United States* v. *Reidel* 402 U.S. 351 (1971) (no Stanley right to sell obscene material through the mails); *Paris Adult Theatre* v. *Slaton* 413 U.S 49, 66- 69 (1973) (no Stanley protection outside the home that follows the obscene material); *Bowers* v. *Hardwick* 478 U.S. 186 (1986) (no Stanley right to at home homosexual sodomy).

Osborne has taken the clearly defined and narrow *Stanley* right to private possession of obscenity and declared it absolute to its logical extreme by including the right to privately possess child pornography. "Yet all [rights] in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached" *Hudson Water* Co. v. *McCarter* 209 U.S. 349, 355 (1908).

Ohio submits that *Stanley* should not be extended to possession of child pornography. As this court noted in *United States* v. *12 200- ft. Reels* 413 U.S. 123, 127 (1973)

the seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. *Stanley* is a "line of demarcation", Id. 127, and is limited to in home possession of obscenity.

Its "logical extension" to child pornography is not warranted in light of the State's compelling interests to protect and nurture its children.

Osborne, who claims a "right to possess and view those photographs and to reap whatever message they may yield," Appellants Brief p. 32, is not the victim of a "governmental program of thought control". *United States* v. *Reidel* 402 U.S. 351, 359 (1971) (Harlan J., concurring).

Keeping in mind that Georgia sought to protect the individual's mind from the effects of obscenity, the State is not manipulating "the content of a man's mind" or the "mere possession of the memorabilia of a man's thoughts and dreams", Id. 359, but rather is seeking to protect children from the past and future harm inherent in child pornography.

When the crime, here possession of child pornography, "can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity", *United States* v. *Reidel* 402 U.S. 351, 359 (1971) (Harlan J., concurring), then Ohio submits that *Stanley* should yield.

This court has long recognized that "a democratic society rests, for its continuance, upon the healthy well rounded growth of young people into full maturity as citizens". *Prince* v. *Massachusetts* 321 U.S. 158, 168 (1944), and that "safeguarding the physical and psychological well being of a minor" is "compelling". *Globe Newspaper Co.* v. *Superior Court* 457 U.S. 596, 607

(1982). See also *Ginsberg* v. *New York* 390 U.S. 629 (1968), *FCC* v. *Pacifica Foundation* 438 U.S 726 (1978). Although the statute was not sufficiently narrow to achieve the interest involved, last term this court concluded that the government had a "compelling interest" in preventing minors from being exposed to non-obscene but indecent telephone messages. *Sable Communications* v. *FCC* 492 U.S. ___ 106 L.Ed 93, 108 (1989). Certainly, the protection of children from the harms of child pornography is also a compelling interest.

The single *Stanley* example of a compelling interest that may override the right of the individual to possess materials was the espionage statute, where the possessor had reason to believe the material could be used to the injury of the United States or the advantage of a foreign nation. *Stanley*, *supra* 568 n.11.

The safety and future security of this county is equally dependent upon our children being free from the scourge of child pornography as upon the detection and prosecution of foreign or internal espionage agents.

First Amendment rights are not absolute, and yield to compelling governmental interests in many contexts.[14] By virtue of *Ferber*, child pornography itself is outside the protection of the First Amendment.

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[14]See *Near* v. *Minnesota* 283 U.S. 697 (1931) (although cited generally for the proposition that the government cannot impose a prior restraint consistent with the First Amendment, the court noted that such a prior restraint may be justified in enjoining the publishing of the schedule of transport ships in the time of war), *Schenck* v. *United States* 249 U.S. 47 (1919) (where Justice Holmes famously noted that the First Amendment did not confer the right to yell fire in a crowded theater), *Brandenburg* v. *Ohio* 395 U.S. 444 (1969) (that criminal syndicalism and Sedition type statutes will be constitutional where there is a "clear and present danger" that unlawful and violent action is imminent and likely) *Chaplinsky* v. *New Hampshire* 315 U.S. 568 (1942) (verbal conduct may be punished if characterized as "fighting words");

Due to the great harm to children in the production, distribution, possession and use of child pornography, "compelling reasons... exist for overriding the right of the individual (Osborne) to possess those materials". *Stanley*, supra at 568, n.11. (Parenthetical material added.)

II. Child pornography includes a lewd exhibition or graphic focus on the genitals.

In this case, decided *sub. nom. Ohio* v. *Young* 37 Ohio State 3d 249, 525 N.E. 2d 1363 (1988) (J.A. 37- 54), the Ohio Supreme Court construed the term "nudity", consistent with the Ohio Statutory scheme on child pornography, to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals". (J.A. 37)

Osborne claims that Ohio may not, consistent with the First Amendment right of freedom of speech, prohibit the possession of child pornography which depicts minors in a state of nudity where that nudity constitutes a "lewd exhibition" or "involves a graphic focus on the genitals".

Osborne claims that this prohibition is overbroad because it encompasses materials protected by the First

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[14]continued

Westermann Co. v. *Dispatch Co.* 249 U.S. 100 (1919) (a court may issue an injunction against continued publications which violate the copyright law); *NLRB* v. *Gissell Packing Co.* 395 U.S. 575 (1969) (NLRB may enjoin the exercise of apparent First Amendment rights when they violate the National Labor Relations Act); *New York Times* v. *United States* 403 U.S. 713 (1971) (governments application to enjoin the publication of the Pentagon papers is denied because they have not carried their burden of justifying the imposition of a prior restraint, indicating that under compelling circumstances the government can sustain such a burden), *Posadas de Puerto Rico* v. *Tourism Co. Puerto Rico* 478 U.S. 328 (1986) (Puerto Rican ban on advertising legalized casino gambling is upheld).

Amendment, and it is not narrowly drafted to serve the compelling state interest of regulating nudity-oriented child pornography.

Ohio believes that this prohibition is not "substantially overbroad" and is narrowly drafted to serve the compelling state interest of regulating that type of child pornography that does not actually depict vaginal, oral, or anal sexual intercourse, but does depict minors involved in lewd exhibitions or graphic focus on the genitals in suggestive poses, such as State's Exhibit 1A, 1B, 1C, and 1D in Osborne's case.

A. The State may prohibit private possession of material that meets the definition of child pornography.

As demonstrated in the first part of this brief, a state may prohibit private possession of child pornography consistent with *Stanley*. Osborne has raised the additional issue as to whether or not the material possessed by him meets the definition of child pornography from *New York* v. *Ferber* 458 U.S. 747 (1982). Ohio submits that the type of photographs possessed by Osborne in this case, photographs which depict a lewd exhibition or graphic focus on the genitals of minors, fit the definition of child pornography and are without First Amendment protection.

B. A visual depiction of a nude minor child that involves a lewd exhibition or graphic focus on the genitals is within the definition of child pornography under *New York* v. *Ferber* 458 U.S. 747 (1982).

The New York statute upheld by this court in *Ferber* prohibited a "sexual performance" which included "sexual conduct" by a minor.

The term "sexual conduct" was defined in New York law to include a "lewd exhibition of the genitals". Id. 750.

This court posited the question in *Ferber* as to "whether a state has somewhat more freedom in proscribing works which portray sexual acts or *lewd exhibitions of genitalia by children*" Id. 753.

In answering that question in the affirmative, the *Ferber* court immediately noted from *Chaplinsky* v. *New Hampshire* 315 U.S. 568 (1942) that "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the *lewd* and obscene." (Emphasis added) Id. 754.

In discussing the reasons why the regulation of child pornography was without First Amendment protection, the court stated "the value of permitting live performances and photographic reproductions of children engaged in *lewd* sexual conduct is exceedingly modest, if not *de minimis*". Id. 762. (Emphasis added)

With respect to a question regarding the overbreadth of that New York statute, this court said "the term *'lewd exhibition of the genitals'* is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation". Id. 765. (Emphasis added)

While noting that nudity, without more, is protected expression, this court, and the Ohio Supreme Court in this case, carefully distinguished between mere nudity and nudity involving children which was posed with a graphic focus on the genitals or depicted minors engaging in a lewd exhibition.

Ohio urges each member of this court to view the four photographs contained in the record in this case and make an independent determination whether those photographs depict "mere nudity" or indeed depict the type of lewd exhibition of the genitals that the court was addressing in *Ferber* when the New York statute was upheld. For that reason, the statute is not substantially overbroad on its face as construed by the Ohio Supreme

Court, or as applied to Osborne.

As noted previously, The Protection of Children From Sexual Exploitation Act of 1977 defined the phrase "sexually explicit", as it relates to child pornography, to include a "lewd exhibition of the genitals or pubic area". This definition of "sexually explicit" conduct was adjusted slightly in the Child Protection Act of 1984 where the first word was changed from "lewd" to "lascivious".[15]

Prior to its amendment, at least one federal court found that the term "lewd exhibition" of the genitals was sufficiently clear that anyone with a modicum of common sense and knowledge of the English language and human nature could understand what was prohibited. *United States* v. *Nemuras* 567 F.Supp. 87 (D. Md. 1983).

Since "there are limitations in the English language with respect to being both specific and manageably brief", *United States Civil Service Commission* v. *National Association of Letter Carriers* 413 U.S. 548, 578 (1973), the terms "lewd exhibition or graphic focus on the genitals" with respect to child pornography are not unconstitutionally vague or overbroad.

The "substantial overbreadth" doctrine from *Broadrick* v. *Oklahoma* 413 U.S. 601 (1973), as utilized in *Ferber*, with respect to a lewd exhibition or graphic focus on the genitals in child pornography applies with equal force in this case. Ohio has not given an expansive construction to this proscription, and whatever overbreadth may exist "should be cured through case-by-case analysis" as suggested in *Broadrick*, *supra* at 615-616. See also *Massachusetts* v. *Oakes* 491 U.S. ___ , 105 L.Ed 493, 505 (1989) (Scalia J., concurring in the judgment and dissenting in part).

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[15]This amendment was described as "only technical", See 1984 U.S. Code Cong. & Ad. News 492, 499. *United States* v. *Meyer* 802 F.2d 348 (9th Cir. 1986) (where indictment upheld that alleged "lewd" where conduct was after statutory amendment to "lascivious".)

To constitute child pornography under *Ferber* the material must involve a visual depiction of children below a specified age engaged in sexual conduct. Id. 764. There also must be "some element of scienter" on the part of the defendant. Id. 765.

Section 2907.323(a)(3), Ohio Revised Code, as construed by the Ohio Supreme Court, meets these tests from *Ferber*. The visual depiction of a minor under age eighteen, with a mental state of recklessness, must involve a lewd exhibition or graphic focus on the genitals to violate the statute.

C. The Ohio statute that prohibits possession of photographs of a nude minor child that involve a lewd exhibition or graphic focus on the genitals is not vague or overbroad.

Although Ohio courts have not specifically defined the terms "lewd exhibition or graphic focus on the genitals" the purpose of the statute is clear, and the terms certainly have precedence both in obscenity and child pornography law. One court in addressing the relevant factors of a "lascivious exhibition of the genitals or pubic area" under the federal statute looked to the following factors as relevant:

1. Whether the focal point of the visual depiction is on the child's genitalia or pubic area.
2. Whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity.
3. Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child.
4. Whether the child is fully or partially clothed or nude.
5. Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.
6. Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. *Dost* 636 F.Supp. 828, 832 (S.D. Cal. 1986), Aff'd *Sub nom United States* v. *Wiegand* 812 F. 2d 1239 (9th Cir. 1987). On appeal, in *Wiegand, supra*, at 1244, the court noted that

the standard employed by the district court was over-generous to the defendant in implying as to the seventeen year old girl that the pictures would not be lascivious unless they showed sexual activity or willingness to engage in it. The offense defined by the statute is depiction of a 'lascivious exhibition of the genitals'. Plainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust. Each of the pictures featured the child photographed as a sexual object... in the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles... that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur. Other courts have looked to the factors listed in *Dost, supra* with respect to a lascivious exhibition of the genitals. *United States* v. *Nolan* 818 F.2d 1015 n.5 (1st Cir. 1987)

The terms "lewd exhibition or graphic focus on the genitals", used by the Ohio Supreme Court in this case are equivalent to the definitions contained in the federal child pornography laws, and as noted in *Wiegand, supra*, the term "'lascivious' is no different in its meaning than 'lewd', a commonsensical term whose constitutionality was specifically upheld in *Miller* v. *California* 413 U.S. 15 (1973), and in *Ferber* 458 U.S. at 765 (1982)".

Next, Osborne seems to argue that *Ferber* requires

vaginal, oral, or anal intercourse involving children to qualify as child pornography, or at least some type of sex act. That simply isn't the case, and this court so stated in *Ferber*. The photographs in this case clearly reflect a lewd exhibition or graphic focus on the genitals. The federal law on the same subject uses nearly identical terminology. The Ohio statute does not criminalize mere "nudity" as alleged by Osborne. Considering the entire Ohio statutory scheme, the Ohio Supreme Court Opinion below, and the recognizable term "lewd exhibition of the genitals", which is a term that is "not unknown in this area", Id. 765, and is an example of permissible regulation in *Miller*, where the Ohio Supreme Court has not given an expansive construction to that term, the Ohio statute is not overbroad.

Next, Osborne claims that commercial distribution is a necessary requirement to fit the definition of child pornography. While it is true that *Ferber* was directed at commercial distribution of child pornography, the court's opinion in *Ferber* clearly indicates that a commercial purpose is not required, and indeed that is the reason the 1977 federal statute was amended to eliminate the commercial requirement that existed in the statute prior to *Ferber*.

Finally, with respect to overbreadth, Osborne contends that the Ohio statute is not narrowly tailored to serve a compelling state interest.

The state believes that it has sufficiently demonstrated that a compelling interest is served by prohibiting possession of child pornography. Merely because the materials do not depict actual vaginal, oral, or anal intercourse with a child, Osborne argues that no sexual abuse or molestation of a child has occurred. Surely sexual abuse and child abuse occur whenever a child is involved in a photograph depicting lewd exhibition or graphic focus on the genitals, such as in this case. Although there is no

sexual contact between the third person and the child, the gymnastic and lewd poses, together with the use of the dildo placed to the young man's anus, surely involves sexual exploitation.[16]

Next, Osborne contends that the Ohio statute is not narrowly tailored to protect children because certain exemptions are present in the statute. Those exemptions serve not to expand the scope of the statute to reach innocent or protected conduct, which is the essence of an overbreadth argument, but rather, those exemptions serve to limit the scope of the statute to regulate material that fits the definition of child pornography under the *Ferber* decision. Those exemptions, in fact, confirm that protected or innocent conduct is outside the scope of the statute. An overbreadth attack on the statute would not succeed even in the absence of those exemptions, but Ohio has chosen to make clear that it has not proscribed possession for bona fide and proper purposes, some of which were of concern to the court in *Ferber*. The parental exception that Osborne claims permits underinclusive regulation, serves to exclude from the statute the idea that it would "make a criminal out of a parent who takes a full frontal view picture of his or her naked one year old running on a beach or romping in a wading pool". *Massachusetts* v. *Oakes* 491 U.S. ___ , 105 L.Ed. 2d 493, 507 (1989) (Brennan J. dissenting). The "artistic purposes" exception in the statute addresses the concern of some members of the court, both in *Ferber* and *Oakes*. Contrary to Osborne's claim, these exceptions limit the scope of the statute to unprotected speech.

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[16] " Even if the child is photographed alone... the producers of the visual material often engage insexual activity with the child before and after photographing". *Note, protection of Children from use in pornography: Toward Constitutional and Enforceable Legislation,* 12 U. Mich., J.L. Ref. 295, 300 and nn.35-36 (1979).

Finally, Osborne claims that the state has not chosen the least restrictive means by which to serve the interests of attacking child pornography. Ohio believes that a comprehensive statutory scheme which not only regulates production and distribution, but also possession, is the least restrictive means by which to serve its interests of preventing harm to children. The harm to children is documented in the *Stanley* portion of this brief as well as the reasons to extend that regulation to possession.

Section 2907.323, Ohio Revised Code, prohibits visual depictions of minors that involve a lewd exhibition or graphic focus on the genitals, which as construed by the Ohio Supreme Court, is not substantially overbroad, serves a compelling state interest, and is narrowly tailored to protect children from the harm inherent in the production, distribution, possession, and use of child pornography.

III. Construction of Section 2907.323, Ohio Revised Code.

Osborne claims that the authoritative construction of Section 2907.323, Ohio Revised Code, by the Ohio Supreme Court in this case, which resulted in affirming his conviction, is a retroactive application of a facially invalid and overbroad statute, which application is prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution.

Ohio respectfully submits that the statutory scheme regulating production, distribution, and possession of child pornography gave fair notice of the conduct proscribed, was not vague or overbroad, and that the authoritative construction of the term "nudity" to a lewd exhibition or graphic focus on the genitals was foreseeable. In such a situation, the statute as authoritatively construed may be applied to conduct which occurred prior

to that construction, provided such application affords fair warning to the defendant, which in this case it did.

A. The Ohio Supreme Court authoritatively construed Section 2907.323, Ohio Revised Code.

Osborne claims that the Ohio Supreme Court substantially "rewrote" Section 2907.323, Ohio Revised Code, and performed "plastic surgery". A fair reading of Sections 2907.321, 2907.322, and 2907.323, Ohio Revised Code, and the Ohio Supreme Court's Decision in this case, belies Osborne's claim.

While Osborne makes much ado about the treatment of scienter, the term "minor", and dicta in the Ohio Supreme Court decision, none of those characterizations are accurate.

The applicability of the mental state of "recklessness", pursuant to an Ohio statute, has been well established Ohio law. Section 2901.21(B), Ohio Revised Code, provides, in pertinent part, with respect to criminal offenses that "when the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." This Ohio statute was enacted in 1974. This Section has been construed by the Ohio Supreme Court on at least two occasions prior to Osborne's offense where it applied the mental state of recklessness to a statutory offense. *State* v. *Adams* 62 Ohio St. 2d 151, 404 N.E. 2d 144 (1980) (applicable to child endangering statute); *Ohio* v. *Parrish* 12 Ohio St. 3d 123, 465 N.E. 2d 873 (1984) (applicable to prostitution offenses). See also *Ohio* v. *McGhee* 12 Oh. Misc. 2d 18, 468 N.E. 2d 400 (1984). The Ohio Supreme Court did not "rewrite" the child pornography possession statute as alleged by Osborne, but rather, merely applied a fifteen year old Ohio statute that had been applied in similar occasions in the past to other

criminal offenses. That application to Osborne in this case was not retroactive, he had fair notice of both the statutory provision and Ohio Supreme Court interpretations of that statute prior to his offense, and its application to the child pornography statute under which he was charged was foreseeable.

With regard to the construction of the term "minor", again, the appellant has exaggerated this claim. In addressing this issue, we start with the "fundamental canon... that... unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States* 444 U.S. 37, 42 (1979). This precept is reiterated in Section 1.42, Ohio Revised Code, that provides that any term left undefined by statute is to be accorded its common, everyday meaning. The ordinary dictionary definition of minor is one who has not yet reached the age of majority. *Webster's Collegiate Dictionary*, 727 (G. & C. Merriam Company, 1981). Section 3109.01, Ohio Revised Code, entitled Age of Majority, provides that "all persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes." See also *Black's Law Dictionary*, 899 (5th Ed. 1979) ("in most states, a person is no longer a minor after reaching the age of eighteen") Section 1339.31(K), Ohio Revised Code, that specifically defines the term "minor" to mean a person who has not attained the age of eighteen years in connection with The Gifts to Minors Act; and the substantially equivalent term "juvenile", which is defined in Section 2907.01(I), Ohio Revised Code, to mean an unmarried person under the age of eighteen. The applicable age is eighteen in all of the references above.

Taken together, it is clear that the Ohio statute prohibited the possession of child pornography that depicted a minor who was under the age of eighteen. Contrary to ap-

pellant's claim, the Ohio Supreme Court did not "rewrite" the statute to achieve its determination that the child pornography possession statute applied to children under the age of eighteen, but merely accorded that term its common, ordinary, and everyday meaning. [17]

Finally, Osborne claims that the Ohio Supreme Court added "elements" to the statutory offense and retroactively applied these new elements to his conviction. In Ohio, both by statute, Section 2503.20, Ohio Revised Code, and by court decision, *Cassidy* v. *Glossip* 12 Ohio St. 2d 17, 231 N.E. 2d 64, (1967), the "syllabus" of an Ohio Supreme Court decision is the law of the case, not the opinion or decision rendered in the case. Osborne focuses on *dicta* in Justice Douglas' opinion for the proposition that additional elements were added to the offense. Ohio disagrees with this characterization. The term minor was merely accorded its common, every day, and normal meaning. Section 2901.21(B), Ohio Revised Code, which has been in effect for fifteen years, was applied as the culpable mental state in accord with multiple Ohio Supreme Court cases decided prior to Osborne's conduct. Appeal to a prurient interest was not added as an element, but is only *dicta* in the opinion. Finally, considering the overall statutory scheme to regulate child pornography, and the exemptions therein, the Ohio Supreme Court accorded the term "nudity" the only appropriate, sensible, and constitutional meaning that could apply. These actions by the Ohio Supreme Court do not result in a retroactive application of Section 2907.323, Ohio Revised Code, to Osborne.

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[17] Interestingly enough, Osborne sought a jury instruction that the term minor in Section 2907.323, Ohio Revised Code, meant fifteen years of age. The uncontradicted evidence was that the boys depicted in the photographs possessed by Osborne were ages 13 and 14, below the age of minority as even Osborne construed that term.

B. The Ohio statutory scheme regulating child pornography provides fair warning of the conduct proscribed.

Osborne's principal claim is that the use of the term "nudity" in Section 2907.323, Ohio Revised Code, is unconstitutional as both vague and overbroad. Osborne then claims that because the Ohio Supreme Court authoritatively construed and narrowed the term "nudity" to apply to lewd exhibitions or graphic focus on the genitals, that such construction resulted in a retroactive application of that statute to him.

At the outset, Ohio would submit that when the Ohio statutory scheme regulating child pornography is considered on its face that it is neither vague nor overbroad. Sections 2907.321, 2907.322, and 2907.323, Ohio Revised Code, regulate the production, distribution, and possession of various types of child pornography. Considering those statutes together, their purpose is evident and clear. Ohio was overly solicitous of protected speech by providing the exemptions in those statutes for bona fide statutory purposes, and parental conduct.

Section 2907.323, Ohio Revised Code, even before it was authoritatively construed by the Ohio Supreme Court, was neither "impermissibly vague in all of its applications", *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 495 (1982), nor substantially overbroad, because its "legitimate reach dwarfs its arguably impermissible applications". *Ferber, supra* at 773.

Although the statute on its face purported to prohibit the possession of "nude" photographs of minors, the exemptions and proper purposes provisions substantially narrowed the statute. (J.A. 42) In addition, Osborne had fair notice that a narrowing construction of the term "nudity" was foreseeable.

In *Ohio* v. *Burgun* 56 Ohio St. 2d 354, 384 N.E. 255 (1978) the defendant had argued that the definition of

obscene material was facially overbroad "because acts of 'simple nudity' as opposed to hard core pornography can also be considered to be obscene". Id. 358. The definition of obscenity under Ohio law, when read in the statutory disjunctive, could have applied to mere nudity. The authoritative construction by the Ohio Supreme Court, consistent with *Miller* v. *California* 413 U.S. 15 (1973), in the *Burgun* case rendered that statutory definition constitutional because mere nudity was not proscribed.

The same argument was made in a federal habeas corpus attack on that statutory definition of obscenity in *Turoso* v. *Cleveland Municipal Court* 674 F. 2d 486 (6th Cir. 1982) cert denied 459 U.S. 880. There the petitioner argued that the statute would permit prosecution for "simple nudity". The court noted "This fear is exaggerated. The Ohio courts have recognized that nudity per se is not obscene. See eg. *Cincinnati* v. *Walton* 76 Ohio Law Abs. 162, 145 N.E. 2d 407 (1957), *State* v. *Lerner* 51 Ohio Law Abs. 321, 81 N.E. 282 (1948)". Id. 491 n.6. See also *State* v. *Rothschild* 109 Ohio Appeal 101, 163 N.E. 2d 907 (1959). A former version of Ohio obscenity laws had been upheld through authoritative construction when it proscribed mere nudity. *State ex rel Keating* v. *Vixen* 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973) State ex rel Ewing v. *"Without a Stitch"* 37 Ohio St. 2d 95, 307 N.E. 2d 911 (1974).

Thus, given the clear import of the Ohio statutory scheme regarding the regulation of child pornography, the statutory exemptions for parents when innocent conduct is involved or other bona fide statutory purposes, and with a history of the Ohio Supreme Court narrowing the application of the term nudity to remain within constitutional bounds, Osborne had fair warning of the conduct proscribed and knowledge that a narrowing construction was foreseeable.

As demonstrated herein, this case is unlike *Shuttlesworth* v. *Birmingham* 394 U.S. 147 (1969), be-

cause the Ohio statute was not radically reconstructed or interpreted beyond its fair proscriptions. Rather than rewriting the statute as alleged by Osborne, the Ohio Supreme Court properly interpreted the statute as written by the Ohio General Assembly.

The Ohio Supreme Court has no more rewritten an overbroad statute than the federal courts that have been called upon to interpret 18 U.S.C.S. §2251 et seq. with respect to the terms lewd and lascivious, as explained in the previous section of this brief.

Statutes do "not require impossible standards of certainty", *United States* v. *Petrillo* 332 U.S. I (1947), and the defendant has "no right to a literal construction" of a statute, *United States* v. *Scales* 367 U.S. 203, 224 (1961), and for that reason the vagueness and overbreadth doctrines are of no avail to Osborne in seeking to set aside his conviction.

C. The authoritative construction of Section 2907.323, Ohio Revised Code, was foreseeable and the conviction properly affirmed.

In *Dombrowski* v. *Pfister* 380 U.S. 479, 491 n.7 (1965) this court said "our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, (citations omitted), provided such application affords fair warning to the defendant." That principle has been long subscribed to by this court. *Cox* v. *New Hampshire* 312 U.S. 569 (1941), *Winters* v. *New York* 333 U.S. 507 (1948), *Poulos* v. *New Hampshire* 345 U.S. 395 (1953), *Ginsberg* v. *New York* 390 U.S. 629 (1968). See also *Hamling* v. *United States* 418 U.S. 87 (1974), and *Ward* v. *Illinois* 431 U.S. 767 (1977). Section 2907.323, Ohio Revised Code, is neither substantially overbroad under this court's decisions nor vague, and "one with fair warning

cannot challenge as vague a statute's application to others". *Parker* v. *Levy* 417 U.S. 733, 756 (1974).

Neither a lack of fair notice, nor vesting law enforcement authorities with too much discretion without minimal guidelines, are vices of Section 2907.323, Ohio Revised Code. When the photographs in question in this case are viewed, there can be no doubt that Osborne knew that those photographs were the kind at which the Ohio statute was directed. The photographs do not depict "mere nudity" or involve innocent poses on the proverbial bear skinned rug in front of the fire place, or the toddler at the beach. These are the type of photographs that cause the great harm to our children recognized by this court in *Ferber* when they are produced, circulated, possessed, and used by pedophiles.

It was well established by this court, and Ohio courts, that simple or mere nudity, without more, cannot be constitutionally proscribed. Reading the Ohio statutes together it is clear that the intention was not to proscribe simple nudity. Past Ohio Supreme Court decisions had narrowed statutes which used the term nudity, even in the disjunctive, to its constitutional reach. That construction was foreseeable, and in fact the only construction, that could be put on the Ohio statute consistent with its history, terms, exemptions, and purpose. This court has long held that in such situations, the statute, as construed, may be applied to conduct that preceded the construction, provided that application afforded fair warning to the defendant. *Massachusetts* v. *Oakes* 491 U.S. __ 105 L.Ed. 2d 493 (1989).

The fact that there were omissions in the instructions to the jury on these issues does not change this result. For, as stated by this court in *Henderson* v. *Kibbe* 431 U.S. 145, 154 (1977) "it is the rare case in which the improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial

court". Osborne did not object in the trial court to the definition with respect to nudity, or relative to a requirement that the nudity must involve a lewd exhibition of the genitals. While those omissions were error, "an omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Id. 155.

When the record is reviewed in this case, those errors that were not objected to by Osborne with respect to the court's instructions, were harmless beyond a reasonable doubt, *Harrington* v. *California* 395 U.S. 250 (1969), and are not a basis to reverse an otherwise validly obtained state conviction because "the outcome of the trial would clearly have been the same had the trial court instructed the jury that lewdness is a necessary element of nudity", and, "[n]o reasonable juror could believe that the photographs involved herein were anything but a lewd display". (J.A. 54).

CONCLUSION

Section 2907.323, Ohio Revised Code, is constitutional on its face and as applied to appellant Osborne for three reasons.

First, Section 2907.323, Ohio Revised Code, as construed by the Ohio Supreme Court, defines the type of material which involves a lewd exhibition or graphic focus on the genitals of children which this court found was not protected speech in *New York* v. *Ferber* 458 U.S. 742 (1982).

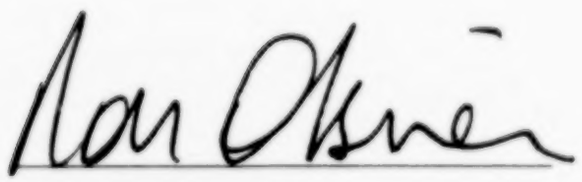
Second, Section 2907.323, Ohio Revised Code, prohibits the private possession of that type of child pornography to serve the compelling state interests of protecting and preventing the substantial harm to children caused by the production, circulation, possession, and use of child pornography. That possessory offense does not offend the principles of *Stanley* v. *Georgia* 395 U.S. 557, 568 n.ll (1969) because "compelling reasons... exist for overriding the right of the individual to possess those materials."

Finally, Section 2907.323, Ohio Revised Code, is not facially overbroad or vague, the narrowing construction of the term nudity was foreseeable, and in such a situation the statute, as construed, may be applied to Osborne's conduct which preceded the narrowing construction because he had fair warning of the conduct proscribed.

For each of the above reasons, the State of Ohio respectfully submits that this court should affirm the judgment of the Ohio Supreme Court.

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this court, I, Ronald J. O'Brien, a member of the bar of this court, hereby certify that on the day 15th of September, 1989 three copies of the foregoing brief of the Appellee, State of Ohio, were personally delivered to the office of counsel of record for Appellant, S. Adele Shank, Assistant Ohio Public Defender, 8 East Long Street, 11 th Floor, Columbus, Ohio, 43266-0587, either to such counsel or an employee therein. I certify that all parties required to be served have been served.



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APPENDIX

[5]Ohio Senate Bill 243, effective 11-17-77, was enacted and reads as follows:

§2907.321 Pandering obscenity involving a minor.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;

(2) Promote or advertise for sale or dissemination; sell, deliver, disseminate, display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, disseminate, display, exhibit, present, rent, or provide, any obscene material that has a minor as one of its participants or portrayed observers;

(3) Create, direct, or produce an obscene performance that has a minor as one of its participants;

(4) Advertise or promote for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants;

(5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants;

(6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers.

(B)(1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under this section.

(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor.

(C) Whoever violates this section is guilty of pandering obscenity involving a minor. Violation of division(A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section or

section 2907.322 [2907.32.2] or 2907.323 [2907.32.3] of the Revised Code, pandering obscenity involving a minor in violation of division (A)(5) of this section is a felony of the third degree.

[10]§2907.322 [Pandering sexually oriented matter involving a minor.]

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) Exhibit or advertise for sale or dissemination, sell, disseminate, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(B) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in material or performance.

(C) Whoever violates this section is guilty of pandering sexually oriented matter involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony

of the second degree. Violation of division (A)(5) of this section is a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(5) of this section, pandering sexually oriented matter involving a minor is a felony of the fourth degree.

§2907.323 [Illegal use of minor in nudity-oriented material or performance.]

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

(2) Consent to the photographing of his minor child or ward, or photograph his minor child or ward, in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing a bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or perfor-

mance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(3) of this section, illegal use of a minor in a nudity-oriented material or performance is a felony of the fourth degree.